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MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 1, 1952. TWELFTH INFORMAL MEETING

ARTICLE XIV

Mr. Otabe referred to previous discussions on Article XII (particularly at the tenth meeting on March 25) and stated that the Japanese side had drafted a proposed reservation with respect both to Article XII, as previously indicated, and Article XIV. Mr. Otabe stated that this reservation would permit either party to impose discriminatory restrictions on the exportation and importation of goods which would have an effect equivalent to restrictions on payments and transfers for international transactions. The latter could then be made effective without violating the provisions of Article XIV. Mr. Otabe added that such discriminatory restrictions are recognized by

the GATT and permitted to the GATT members in order effectively to implement their controls over international transfers of payments. Such measures, he added, are permissible in order to save or acquire dollars, as well as to use inconvertible accumulated currencies until the free convertibility of currencies is restored.

Mr. Otabe therefore proposed that the following reservation be added to the Protocol to the FCN Treaty, and suggested that it be placed immediately after paragraph 3-bis, recently added to the standard draft:

> "It is understood that, until the general convertibility of currency is restored, the provisions of paragraphs 2 and 4 of Article XII shall not be construed to prevent either Party from taking such measures of exchange control as may be necessary from time to time to deal with a stringency of foreign exchange. However, such measures shall depart no more than necessary from the provisions of said paragraphs, and shall be conformable with a policy designed to promote the maximum development of non-discriminatory foreign trade and to expedite the attainment both of a balance of payments position and of reserves of foreign exchange which will obviate the necessity of such measures. A Party may also, notwithstanding Article XIV, paragraphs 2 and 3 (b), apply quantitative restrictions on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to the preceding sentences of the present provision."

Mr. Otabe stated that this reservation was substantially in accordance with paragraph 6 of the Protocol to the United States FCN Treaty with Israel. He added that the first sentence was modified slightly in view of the differences between the provisions of the standard draft and of the Treaty with Israel. He stated that no changes had been made in the second sentence, and that the inclusion in the third sentence of the term "or which are necessary to make effective" was deemed necessary by the Japanese side to cover those export restrictions designed to acquire hard currency. Mr. Otabe added that this principle is recognized by the GATT. With reference to the last sentence of the Protocol to the Treaty with Israel, Mr. Otabe stated that it was dropped from the Japanese proposal because the consultative clause was already provided for in Article XII of the standard draft, but had not been included in either Article XII or Article XIV of the Treaty with Israel.

Mr. Adams replied that the reservation proposed by the Japanese side would be given careful consideration and that this subject could again be disucssed at later meetings.

Mr. Otabe then inquired whether the terms of Article XIV, paragraph 4, include those measures considered necessary for: (a) the protection of life and health of persons, animals and vegetation; (b) restrictions on the importation of prison-made goods; (c) the protection of "national treasurers"; and (d) for the protection and preservation of natural resources.

Mr. Singer replied that this paragraph stipulates that restrictions based on humane, moral, sanitary or other non-commercial considerations of a customary sort shall not be imposed or administered in such a manner as to discriminate arbitrarily against the commerce of the other Party. Such restrictions therefore should be governed by the general spirit of most-favored-nation treatment.

Mr. Adams added that points a, b, and c mentioned by Mr. Otabe appeared to be included in paragraph 4. The first point (i.e. "protection of life and health") was covered by the word "sanitary" in this paragraph. With reference to points b and c, he stated that Japanese laws which might restrict the importation of prison-made goods and which already forbid the exportation of art and historical objects (which have officially been designated "national treasurers" of Japan) would be considered as falling within the category of "non-commercial nature" in paragraph 4. It would appear that they would not be discriminatory since they were, or would be, applied by Japan with respect to all countries.

In response to a request by Mr. Adams as to the meaning of the fourth point previously mentioned (i.e. measures to protect and preserve natural resources), Mr. Otabe stated that this referred to measures of the type authorized under the GATT. Mr. Otabe added that under paragraph 1 (g), Article XX of the GATT it was permissible for a country to implement export restrictions related to the conservation of exhaustible natural resources when such measures were made effective in conjunction with restrictions on domestic production or consumption. He stated that there were no such conservation measures contemplated at the present time, and that it was difficult therefore to cite a specific illustration of this type of measure. Mr. Otabe added, however, that it might be necessary, for example, to institute strict domestic consumption controls on copper in order to conserve Japan's mineral resources, and that measures to control copper exports would follow as a matter of course. It was this general type of prohibition or restriction that was meant, stated Mr. Otabe, and he then inquired whether this was included in paragraph 4, Article XIV.

Mr. Bassin inquired whether the restrictions envisaged by the Japanese side were of a type which might properly come within the provisions of Article XXI, paragraph 3 d (measures to protect essential security interests). Mr. Otabe replied that these restrictions might often have a national security character, but that he questioned whether they would always fall clearly in this category.

Mr. Singer then inquired whether the restrictive export measures under discussion would conflict with established international commitments (e.g., participation in IMC with respect to a copper quota from Japan) and whether these measures would be applicable to all countries alike, and would therefore not discriminate against the trade of the United States with Japan.

Mr. Otabe replied that these measures would not conflict with international obligations of a specific nature, such as the definite quota systems established by IMC for its participants, and, further, that such measures would not discriminate against one country, since they would apply to all countries.

Mr. Singer then stated that, although it was somewhat difficult to make a definitive reply to a general question of this nature, it was believed that the type of export restriction mentioned by Mr. Otabe (i.e., to conserve exhasutive materials, in conjunction with restrictions on domestic production or consumption, as defined in the GATT) was included among the measures described in paragraph 4, Article XIV.

ARTICLE XV

Mr. Otabe stated that there was some question on the Japanese side as to the exact meaning of the phrase "administrative requirements or restrictions" in the second sentence of paragraph 1, Article XV. He added that this sentence states that such requirements or restrictions should not, as a general rule, go into effect until 30 days after publication. He pointed out that the phraseology employed was unlike that found in the first sentence (i.e., "laws, regulations and administrative rulings"), and asked if the latter were included in the "requirements or restrictions" of the second sentence.

Mr. Bassin replied that the phrase "new administrative requirements or restrictions" in the second sentence was not necessarily included in the phrase "laws, regulations and administrative rulings", as used in the first sentence. He explained that, in general, the second sentence contemplated that 30 days public notice would be given in the event of the issuance of a new "administrative" requirement or restrictions affecting imports. Mr. Bassin said that a "law" restricting imports would not be considered an "administrative" act, but that a "regulation" or an "administrative ruling" could be so considered, depending on the circumstances surrounding its publication. Mr. Bassin said that when an administrative "regulation" or "ruling" has the effect of imposing a new requirement or restriction affecting imports, 30 days public notice would be required under this provision.

Mr. Nagai stated that in his opinion Article XV followed the lines of Article X of the GATT, and that paragraph 1 was concerned with the same matters covered in paragraphs 1 and 2, Article X of the GATT. Since the latter made a distinction between administrative requirements on the one hand and the actual rates of duty on the other (i.e., the GATT merely states that advances in rates of duty shall not be enforced before their official publication), Mr. Nagai asked whether tariff rates are covered in the second sentence of paragraph 1, Article XV of the standard draft.

Mr. Singer replied that it was believed that changes in the customs tariff were not included among the "administrative requirements or restrictions" mentioned in the second sentence, and would therefore not fall within the provision requiring publication 30 days prior to implementation.

Mr. Nagai stated that the Japanese side would give further study to paragraph 1 in the light of these comments. Mr. Otabe then stated that he believed that anti-dumping measures should be enforceable without delay in cases of emergency. He stated that it was quite possible that a country might have to implement anti-dumping restrictions without delay, and that the requirements that such restrictions not become effective until at least 30 days after publication, as implied in the second sentence, would completely nullify their effect. In cases of serious dumping activities, added Mr. Otabe, he believed that immediate measures to restrict or prohibit imports of the commodity concerned were absolutely essential, and that these measures should apply equally to products en route at the time of the publication of such measures. Unless protective measures of this type were permissible under paragraph 1, it was suggested that the phrase "other customary grounds of a non-commercial nature" be inserted.

Mr. Adams replied that it was believed that measures of the type described by Mr. Otabe already being permissible under certain provisions of paragraph 4, Article XIV, could properly be implemented on publication in emergency cases. He added that it was not necessary to revise the wording of the second sentence to cover such situations, since the words "as a general practice" (in addition to the terms of paragraph 4, Article XIV) would provide a Government with sufficient freedom of action to take immediate and specific measures against unfair trade practices.

Mr. Mori stated that the second sentence of paragraph 2 was not clear to the Japanese side, and he requested a clarification of this clause. Mr. Singer replied that this phrase meant that infractions of a minor nature (clearly not resulting from an attempt to evade customs regulations or to seek lower tariff rates by supplying false information) which were the result of clerical error in the preparation of customs declarations or other forms should not be penalized except in a nominal fashion.

In answer to a question by Mr. Nagai as to the meaning of the word "nominal" as employed in paragraph 2, Mr. Singer stated that this term meant negligible, small, trivial, inconsequential, or in some cases might even mean fictitious or existing in name only. He added that if a monetary penalty were imposed for violations of customs regulations, only a very small fine - or possibly none at all, such minor infraction merely being made of record - would be imposed in connection with an infraction resulting from clerical error not made in bad faith. With respect to minor infractions of shipping laws and regulations, Mr. Singer confirmed Mr. Nagai's statement that these were the minor breaches of customs regulations or procedural requirements (such as clerical errors made in documentation) mentioned in Article VIII of the GATT.

ARTICLE XVI

In view of the statement in paragraph 1 of this Article concerning national and most-favored-nation treatment to the products of the other Party, Mr. Otabe asked whether it was permissible to impose restrictions on the sale, distribution, and use of critical commodities imported into Japan under IEC quotas, or which might be subject to United States Department of Commerce (Office of International Trade) export controls. He stated that such restrictions were necessary in order to prevent the diversion of such imported commodities, and that it was possible that similar commodities of domestic origin might not be subject to the same restrictions.

Mr. Adams replied that such controls as were mentioned by Mr. Otabe were believed generally to fall under paragraph 1 (d), Article XXI (i.e., measures necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security). He referred to Mr. Otabe's statement that imported materials of a critical nature might be subject to control to prevent their diversion of mis-use, while domestic products were left uncontrolled. In this connection Mr. Adams stated that it was generally assumed that end-use or allocation controls would apply to critical materials of both domestic and foreign origin. Although it might be possible that certain specific restrictions (such as a ban on re-export) might be applied in some cases to imported materials and not to similar domestic commodities, it was a generally accepted principle that restrictions on the distribution and use of critical materials were imposed on domestic and imported commodities alike in order to maintain adequate allocation and end-use controls. If, in exceptional cases, domestic materials were left uncontrolled and such restrictions were applied only to imported materials, these would have to be studied in each case in order to determine whether they were consistent with the principles of paragraph 1, Article XVI.

Mr. Nagai then asked whether special measures to control critical materials imported by the Japanese Government under its "Laws for the Special Account for the Importation of Critical Materials" would be in contravention to the national treatment provisions of the present Article.

Mr. Singer replied that since this question was concerned with imports by the Government itself, it was believed that certain exceptional restrictions might be imposed on their sale or distribution which would not apply either to commercial imports, if any, or to domestic production. It was believed that such restrictions on critical commodities imported by the Government were permissible notwithstanding paragraph 1, but specific determination could not be made on this point until these restrictions were formulated.

Mr. Nagai then stated that the Japanese Government intended to decontrol rice (as to pricing and distribution), possibly in the near future. Such a step would probably be taken in connection with domestic rice only, imported rice remaining under strict allocation control by the Government. All imported rice, even that brought in by private traders, must now be delivered to the Food Agency of the Ministry of Agriculture. That Agency would retain control over all imported rice (after the de-control of domestic rice) in order to help stabilize prices, release supplies where and when needed, maintain an adequate flow of foodstuffs into market channels, and to hold food reserves for emergency purposes. Controls of this type would also be imposed, following the system presently in effect, with respect to such other essential staple foods as barley and wheat. These imported foods, like rice, are also under the control of the Food Agency. Mr. Nagai stated that it was considered essential that such imported staple foods continue to be regulated (with respect to sale and distribution) even after domestic staple foods were de-controlled. He asked whether such measures would be inconsistent with paragraph 1.

Mr. Adams replied that no general statement could be made in advance of the formulation of specific measures of this type, but that it was believed that restrictions on the sale and distribution of Government-owned or controlled stocks of imported staple foods would be permissible if designed for the purposes outlined by Mr. Nagai. While it would appear that such action would not be in accord with the national treatment provision of Article XVI, he believed that such treatment would not be claimed in this case if these extraordinary measures were clearly imposed for the sole purpose of safeguarding Japan's food supply. It was understood, of course, that the most-favored-nation principle would not be violated in this connection.

Mr. Nagai stated that Article IV of the GATT allows a contracting party to require the exhibition of cinematograph films of national origin during a specific minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin. Since Japan may in the future take measures in line with this principle, the Japanese side was considering a reservation in this connection to be inserted in the Protocol.

Mr. Singer replied that such control over the exhibition of motion pictures as outlined in the GATT would appear to be permissible under paragraph 1, Article XVI, in view of the formulation of the standard

draft along lines consistent with the GATT provisions. He suggested, however, that further study be given the question raised by Mr. Nagai.

ARTICLE XVII

Mr. Otabe requested an explanation of the term "exclusive or special privileges" as used in Article XVII. Mr. Bassin said that these were special exemptions (for example, in connection with taxation or customs duties), privileges (such as free postage or transportation, including reduced rates), subsidies, concessions, the granting of exclusive monopoly rights in a certain area or over a certain commodity, and other similar privileges which might be accorded by a Government to one of its agencies or to any quasi-official or non-official organization. He added that, generally speaking, the enterprises or monopolies to which this Article refers have been limited to Governmental agencies in recent years, the previous system of granting exclusive or monopolistic rights to private companies having practically disappeared.

Mr. Nagai then stated that the operation of the Japan Monopoly Corporation, which is entrusted by the Government with the monopoly of tobacco, salt, and comphor, and of state trading, such as the Government Special Accounts (one of which, for example, is responsible for the purchase, custody and sale of all precious metals) is in conformity with the provisions of Article XVII, since their purchases and sales involving imports or exports are conducted in accordance with normal commercial considerations. With respect to these state trading enterprises, Japan wished to reserve its position in connection with exceptional measures needed effectively to utilize accumulated or inconvertible currencies. Such a reservation, he added, would be in accordance with the position taken on Articles XII and XIV.

Mr. Mori pointed out that a state trading enterprise might purchase a considerable amount of tobacco, for example, from a Sterling Area Country, despite the fact that the price might be as much as 20 per cent higher than from other sources. Such procurement from the Sterling Area would be encouraged because of the absolute necessity that the Government attempt to reduce the extraordinarily large balance of sterling presently in its hands.

Mr. Bassin replied that this matter was closely related to the points raised in connection with exchange control and measures at the seventh meeting (March 13, 1952), when paragraphs 2, 3 and 4 of Article XII were discussed. He referred to the comments made by the American side as to the reasonable and justifiable utilization of accumulated currencies in a manner not unnecessarily detrimental nor arbitrarily discriminatory to the interests of the other Party. Subject to these comments, Mr. Bassin stated that he was of the opinion that state trading enterprises could utilize accumulated or inconvertible currencies in

much the same manner as might be appropriate under the quarterly foreign exchange budget system.

It was agreed that the next meeting would be held on Thursday, April 3, 1952 at which time discussions would begin on Article XVIII.

/s/ M. Yukawa

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/s/ Frank A. Waring

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